

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 24, 2009 Session

ALISON MARIE YATES v. JAMES MASON YATES

**Direct Appeal from the Chancery Court for Rutherford County
No. 05-0999 J. B. Cox, Chancellor**

No. M2008-00552-COA-R3-CV - Filed May 26, 2009

This case involves a divorce ending a three year marriage. Wife/Appellant appeals the trial court's division of marital property, its decision not to award alimony, and its decision granting Husband/Appellee sole decision-making authority for their only child. Because the trial court failed to apply the relevant statutory factors, we reverse the trial court's division of marital property and remand for further consideration. Wife/Appellant also appeals the trial court's order finding her in criminal contempt for willfully violating previous court orders and the parenting plan. We reverse the trial court's judgment on the issue of contempt because Wife was tried *in absentia*.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part,
Reversed in Part and Remanded**

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S. and DAVID R. FARMER, J., joined.

Eric J. Burch, Manchester, TN, for Appellant

Darrell L. Scarlett, Murfreesboro, TN, for Appellee

OPINION

Background

Alison Marie Yates ("Wife") and James Mason Yates ("Husband") were married on September 7, 2002. One child was born to the parties. Until 2004, Wife did not work outside the home and spent most of her time taking care of the parties' son. Wife has a high school diploma and some college credit. She has never earned more than \$25,000 in a year. Husband is a real estate broker and owner of a company named Yates Enterprise Construction. Through these sources,

Husband earns approximately \$100,000 a year. He also spends a significant amount of time with their child.

On July 7, 2005, Wife filed a petition for divorce in the Rutherford County Chancery Court seeking a divorce on the grounds of irreconcilable differences and inappropriate marital conduct. Husband filed an answer and counterclaim in which he alleged that Wife had engaged in inappropriate marital conduct. The litigation was far from civil with both parties behaving inappropriately at some point during the proceedings below.

On July 6, 2006, the trial court, sitting without a jury, heard the matter and found both parties guilty of inappropriate marital conduct. In its final order, the trial court found that Husband should be designated the primary residential parent and granted decision making authority. Under the parenting plan, the trial court granted Husband decision making authority over all “educational decisions, non-emergency health care, religious upbringing, and extracurricular activities.” The trial court also made a division of the marital property. The division was equal with the exception (as discussed below) of Yates Enterprise Construction and a piece of real property purchased shortly before this action was initiated. The trial court decided not to award the Wife any alimony or attorney’s fees.

The trial court’s order unfortunately did not end the proceedings below. Wife filed two motions to alter or amend the judgment, but a hearing on the motions was consistently delayed. The matter was finally set for a hearing on November 29, 2007. In the meantime, Husband filed a Motion for Contempt on November 15, 2007. The motion alleged that Wife had committed criminal contempt by willfully violating portions of the trial court’s orders and parenting plan. The motion and a Notice of Constitutional Rights was mailed to Wife. The contempt motion, along with Wife’s motion to alter or amend the judgment, was set to be heard by the trial court on November 29, 2007.

On the morning of the hearing, Wife faxed a letter to the courthouse informing the trial judge that she would be unable to attend due to an illness. Because this matter had been delayed for so long, the trial court denied Wife’s motion for a continuance. The court then held a hearing in which it considered both Wife’s motion to alter or amend the judgment and Husband’s motion for contempt. In an order dated February 7, 2008, the trial court denied Wife’s motion to alter or amend the judgment. The court also found Wife in criminal contempt for several acts and fined her for each violation. Wife appeals.

Issues for Review

- 1) Whether the Trial Court erred in finding Appellant in criminal contempt?
- 2) Whether the Trial Court erred in granting Appellee sole decision-making authority over all major decisions?
- 3) Whether the Trial Court erred in not awarding Appellant alimony?

- 4) Whether the Trial Court erred in its division of marital property?
- 5) Whether the Trial Court erred in not awarding Appellant attorney's fees?

Law and Analysis

We first address the trial court's decision granting Husband sole decision-making authority for the parties' only child. When reviewing a trial court's decision on custody, we examine the court's factual findings *de novo*, accompanied with a presumption of correctness. Tenn. R. App. P. 13(d). "Absent some compelling reason otherwise, considerable weight must be given to the judgment of a trial court in a divorce proceeding in respect to the credibility of the parties and their suitability as custodians." *Mimms v. Mimms*, 780 S.W.2d 739, 744 (Tenn. Ct. App. 1989). The trial court had the opportunity to observe the parties and evaluate their suitability as custodians. *Bush v. Bush*, 684 S.W.2d 89, 94-95 (Tenn. Ct. App. 1984). Trial courts are therefore granted "wide discretion in matters of child custody, and reviewing courts will not interfere except upon a showing of erroneous exercise of that discretion." *Id.* at 744-45.

Both Husband and Wife agreed that mutual decision-making was impractical and inappropriate. Tenn. Code Ann. § 36-6-407 specifies the criteria for the trial court to consider when allocating parenting responsibilities:

- (1) The existence of a limitation under § 36-6-406;
- (2) The history of participation of each parent in decision making in each of the following areas: physical care, emotional stability, intellectual and moral development, health, education, extracurricular activities, and religion; and whether each parent attended a court ordered parent education seminar;
- (3) Whether the parents have demonstrated the ability and desire to cooperate with one another in decision making regarding the child in each of the following areas: physical care, emotional stability, intellectual and moral development, health, education, extracurricular activities, and religion; and
- (4) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

Tenn. Code Ann. § 36-6-407(c)(1)-(4). The trial court did not make factual findings with respect to the statutory factors. In its final order, the trial court did find that "Mr. Yates should be designated the primary residential parent and granted decision making authority." On appeal, Wife contends that the trial court erred and that she should be awarded sole decision-making authority.

Although the trial court should have been more specific in its findings, the record does support its ultimate conclusion. The predominant factor is that the parties appear completely unwilling or unable to make major decisions together. This fact limited the options available to the trial court. With respect to the other factors, the trial court stated from the bench that Husband had “deeper roots” in the community and appeared “more analytical” than Wife. The remaining parts of the record are conflicting and indicate that both parents were heavily involved in their child’s educational and extracurricular activities. Considering this conflicting evidence, we find that the trial court acted within its discretion in granting sole decision-making authority to Husband.

Alimony and Attorney’s Fees

Tennessee law recognizes several types of spousal support: alimony in futuro, alimony in solido, rehabilitative spousal support, and transitional spousal support. Tenn. Code Ann. § 36-5-121; **Riggs v. Riggs**, 250 S.W.3d 453, 456 (Tenn. Ct. App. 2007). Tenn. Code Ann. § 36-5-121(d)(2) indicates a statutory preference for rehabilitative alimony over more long term forms of spousal support. **Riggs**, 250 S.W.3d at 456. The “propriety of awarding alimony as well as the adequacy of the amount awarded depends upon the unique facts of each case.” **Lindsey v. Lindsey**, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997). Accordingly, the decision to award alimony rests within the sound discretion of the trial court and will not be altered on appeal absent an abuse of that discretion. **Id.** This standard requires us to consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. *See Bif v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *2 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed). While we will set aside a discretionary decision if it rests on an inadequate evidentiary foundation or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative. **State Ex Rel. Vaughn v Kaatrude**, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000).

Tenn. Code Ann. § 36-5-121 lists the relevant factors for a court to consider when deciding whether the payment of alimony is appropriate:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;

- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i)(1)-(12). Among these factors, “the two that are considered the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay.” *Riggs*, 250 S.W.3d at 457 (citing *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002)). In this case, the trial court found that long term alimony would be inappropriate because of the short duration of the marriage. The trial court further declined to award rehabilitative alimony because of Husband’s payments to Wife during the pendency of the divorce action.

On appeal, Wife contends that the trial court erred because she does not yet have the job skills and education necessary to support herself. The trial court, however, found that Wife had been given the opportunity to obtain some job training but had declined to avail herself of this opportunity. Wife does not address the payments she received from Husband prior to the conclusion of the divorce proceeding. Having reviewed the entire record in this case, we find that the trial court did not abuse its discretion when applying the relevant statutory factors. Accordingly, we affirm the trial court’s decision to deny Wife’s request for alimony.

Wife also contends that the trial court erred in not awarding her attorney's fees. "The award of attorney's fees and legal expenses is largely in the discretion of the trial judge, and the trial court's determination will not be disturbed unless we find the evidence preponderates toward the contrary." *Barnhill v. Barnhill*, 826 S.W.2d 443, 456 (Tenn. Ct. App. 1991). An award of attorney's fees is appropriate when "the spouse seeking them lacks sufficient funds to pay his or her own legal expenses or would be required to deplete his or her resources in order to pay these expenses." *Smith v. Smith*, 984 S.W.2d 606, 610 (Tenn. Ct. App. 1997). Because an award of attorney's fees is treated as an award of alimony, the trial court must consider the statutory factors used when considering a claim for alimony. *Sullivan v. Sullivan*, 107 S.W.3d 507, 512 (Tenn. Ct. App. 2002) (citing *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995)).

In the present case, Wife presents no evidence indicating that the trial court erred in denying her request for attorney's fees. As discussed below, we are satisfied that Wife's portion of the marital property provides her sufficient resources to pay her attorney's fees. Accordingly, we find that the trial court did not abuse its discretion and affirm its judgment on this issue.

Division of Marital Property

We next address the wife's concerns regarding the trial court's division of the marital property. While the parties are each entitled to an equitable division of the marital property, that division does not need to be precisely equal. *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Altman*, 181 S.W.3d at 683. Like a decision on alimony, trial courts have "wide latitude in fashioning an equitable division of marital property." *Altman v. Altman*, 181 S.W.3d 676, 683 (Tenn. Ct. App. 2005). Accordingly, we will defer to the trial court's division of the marital estate unless it is inconsistent with the statutory factors or not supported by a preponderance of the evidence. *Id.* There are several statutory factors for the trial court to apply when dividing marital property:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the

contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;

(6) The value of the separate property of each party;

(7) The estate of each party at the time of the marriage;

(8) The economic circumstances of each party at the time the division of property is to become effective;

(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;

(10) The amount of social security benefits available to each spouse; and

(11) Such other factors as are necessary to consider the equities between the parties

Tenn. Code Ann. § 36-4-121(c)(1)-(11). Applying these factors, the trial court awarded 62% of the marital estate to Husband and the remaining 38% to Wife. The trial court made an equal division of the majority of the marital assets but divided Yates Enterprise Construction and 721 President's Place in Husband's favor. On appeal, Wife contends that the trial court should have made an equal division of these two pieces of the marital property.

Wife first challenges the trial court's division of Yates Enterprise Construction ("Yates"). The trial court found that Yates had appreciated in the amount of \$104,000 during the course of the marriage. The trial court found that Wife made a substantial contribution to this appreciation, but "it was clearly outweighed by the husband's contribution directly related to this particular endeavor." Accordingly, the trial court awarded Wife \$20,000 for her contribution to Yates's appreciation.

Turning to the statutory factors, it appears that the trial court based its division of the Yates property on the fifth factor—i.e., that Husband contributed to the appreciation of the asset more than Wife. The record, however, does not indicate that the trial court considered the other statutory factors. From our review these factors, on the whole, tend to fall in Wife's favor. Although the marriage was brief, Husband retains a significantly larger estate than Wife and has more ability for "future acquisitions of capital assets." *See* Tenn. Code Ann. § 36-4-121(c)(4). Accordingly, we reverse the trial court's division of the Yates property and remand the matter to the trial court with instructions to apply all the relevant statutory factors in making its division of the business.

Wife also challenges the trial court's division of the property at 721 President's Place ("President's Place"). This property was purchased a week prior to the initiation of the divorce proceedings. The trial court found that the value of the parties' equity in President's Place was approximately \$39,000. Although finding that this equity was marital property, the trial court

awarded Wife only \$10,000 as her share of the equity in President's Place. Furthermore, the trial court found that "Husband shall receive a credit of \$20,000 due to payments made on the President's Place property during the pending of the divorce." The trial court then concluded, without further explanation, that "Husband has a net credit of \$10,000 with respect to President's place."

Although the record is confusing on this point, it appears that the trial court considered Husband's \$20,000 in payments to be separate, rather than marital, property. In doing so, the trial court subtracted the \$20,000 from the total of the equity, leaving approximately \$20,000 as marital property. In its statements at trial, the court indicated that the \$20,000 in equity would be divided evenly with Wife receiving \$10,000. The final order, however, leaves Wife owing \$10,000 with respect to President's Place. In doing so, the trial court apparently credited Husband twice for his payments relating to President's Place. We find that the trial court was in error. Because the record does not reveal the precise value (other than vague approximations) of President's place, we are unable to address this error directly. On remand, the trial court should make a determination of the value of President's Place and divide the property as appropriate.

Finally, Wife asserts that the trial court erred in dividing the appreciation during the marriage of the ROTH, SEP, and life insurance accounts. The trial court divided this property equally, but Wife asserts that the court's finding on the value of the property was contrary to the evidence submitted by the parties. The trial court did not make a finding on the value of the accounts, but in its final order, it stated that "Wife be, and hereby is, awarded the sum of \$3,846.62 representing one-half ($\frac{1}{2}$) of the increase in the ROTH and SEP accounts as well as the insurance accounts." In the next paragraph, the court stated that "Husband shall receive a credit against the above amounts in the amount of \$4,344.07 representing account reduction during the marriage." Wife asserts, and Husband does not appear to dispute, that the trial court incorrectly calculated the value of the accounts. We agree that the court's conclusion is not supported by the evidence. On remand, the trial court should make specific findings on the value of these accounts, determine which parts are marital property, and divide appropriately.

Criminal Contempt

On November 15, 2007, Husband filed a Motion for Contempt alleging that Wife had willfully violated the trial court's orders on multiple occasions. At the same time, Husband filed a Notice of Constitutional Rights informing Wife that she had been charged with at least one count of criminal contempt under Tenn. Code Ann. § 29-9-102. The motion for contempt, along with Wife's motion to alter or amend the judgment, were set for a hearing on November 29, 2007.

Although Wife did not attend the hearing, the trial court heard Husband's motion for criminal contempt. In its order finding Wife in criminal contempt, the trial court explained why it proceeded without Wife present:

THIS CAUSE came to be heard on the 29th day of November, 2007 upon the second Motion to Alter or Amend filed by the plaintiff, Motion of the Respondent and

Motion for Contempt filed by Respondent. At approximately 7:02 a.m. on November 29, 2007 Petitioner faxed to the Court a Motion for Continuance for Good Cause and an attached note on Southern Hills Family Medicine of Nolensville letterhead which stated, "Alison Yates has been under my care from: 11/25/07 to 11/30/07. Patient may return to work/school on: 11/30/2007 with no restrictions." The signature is illegible and the note is dated November 28, 2007. There is no further indication and no records attached indicating the reason Petitioner was under the care of a physician and no indication that she could not appear in court for the scheduled hearing on November 29, 2007. In fact, the Court specifically noted Petitioner was apparently well enough to travel from her home to Kinko's the morning of the hearing to transmit the Motion and attachment and further, that she would be able to return to work the following day with no restrictions. Further, Petitioner, both through her appearance regarding these proceedings and her prior work with the Domestic Violence Court in Rutherford County, is familiar with court procedures and the need to be present promptly and present sufficient information to the Court for the Court to make a decision. The Motion was received by the secretary to the Honorable J.B. Cox, Chancellor and the court's secretary called Petitioner's cell phone and received a voicemail recording whereupon a message was left advising Petitioner she needed to appear in court on November 29, 2007 at 9:00 a.m. No return call to the Court was made by the Petitioner and the Petitioner did not appear for the hearing. The Court finds Petitioner has not shown good cause to continue this case that she did not appear and did not have an acceptable excuse for not appearing.

In the same order, the trial court found Wife in criminal contempt and assessed fines in the amount of \$1,250 and entered a judgment against her in the amount of \$24,967.69. The judgment was based on two findings of criminal contempt for Wife's failure to file her 2005 and 2006 tax returns in accordance with the trial court's orders. The amount of the judgment was based on Husband's additional tax liability as a result of Wife's contempt. The trial court's judgment also included Husband's expenses and attorney's fees incurred in preparation for the hearing.

On appeal, Wife challenges the trial court's finding of criminal contempt on three grounds: (1) Wife was not given notice as required by Tenn. R. Crim. P. 42; (2) the trial court abused its discretion by denying Wife's Motion to Continue; and (3) the hearing for criminal contempt was held without Wife being present in violation of Tenn. R. Crim. P. 43.

The behavior found to be criminal contempt did not occur in the presence of the trial judge. Tenn. R. Crim. P. 42(b) therefore governs Wife's right to receive notice:

A criminal contempt shall be prosecuted on notice, except as provided in subdivision (a) of this rule.

(1) Content of Notice. The criminal contempt notice shall:

- (A) state the time and place of the hearing;
- (B) allow the defendant a reasonable time to prepare a defense; and
- (C) state the essential facts constituting the criminal contempt charged and describe it as such.

(2) Form of Notice. The judge shall give the notice orally in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by a show cause or arrest order.

Tenn. R. Crim. P. 42(b). Wife does not challenge the content of the notice; instead, she argues that the form of the notice was inadequate. Wife received notice of the criminal contempt charge when she received Husband's Motion for Contempt and Notice of Constitutional Rights in the mail. On appeal, she contends that this was insufficient and that a show cause or arrest order was necessary. Husband concedes that Wife did not receive notice from a judge in open court or in the form of a show cause or arrest order.

Wife also contends that the proceedings for criminal contempt violated Tenn. R. Crim P. 43 because she was not present at the November 29, 2007 hearing. Rule 43 discusses, in relevant part, the requirements for the presence of the defendant:

(a) Presence Required. Unless excused by the court on defendant's motion or as otherwise provided by this rule, the defendant shall be present at:

- (1) the arraignment;
- (2) every stage of the trial, including the impaneling of the jury and the return of the verdict; and
- (3) the imposition of sentence.

(b) Continued Presence Not Required. The further progress of the trial, to and including the return of the verdict and imposition of sentence, shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:

- (1) Voluntary Absence. Voluntarily is absent after the trial has commenced, whether or not he or she has been informed by the court of the obligation to remain during the trial; or

(2) Disruptive Conduct. After being warned by the court that disruptive conduct will result in removal from the courtroom, persists in conduct justifying exclusion from the courtroom.

Tenn. R. Crim. P. 43. In *State v. Far*, 51 S.W.3d 222 (Tenn. Crim. App. 2001), the Court held that “Rule 43 only allows a trial *in absentia* when the defendant is first present at trial and then leaves, voluntarily or otherwise.” *Id.* at 227. In *Denton v. Phelps*, No. E2005-00101-COA-R3-CV, 2005 WL 2546921 (Tenn. Ct. App. Oct. 12, 2005), a motion for criminal contempt was filed alleging that the defendant had violated an Order of Protection. *Id.* at *1. The defendant did not appear at the hearing and was convicted *in absentia*. *Id.* at *2. Because the defendant was “not first present at trial,” the court followed the ruling in *Far* and reversed the trial court’s judgment. *Id.*

In the present case, Wife was not first present at the criminal contempt hearing but was nonetheless convicted of several counts of criminal contempt. Following *Far* and *Denton*, we find that the trial court violated Tenn. R. Crim. P. 43. Accordingly, the trial court’s judgment finding Wife in criminal contempt is reversed.

A separate, but related, issue involves the judgment entered in favor of Husband providing compensation for his additional tax liability. Typically, a contempt petition “seeking to vindicate the rights of the complainant” is characterized as civil contempt. *Robinson v. Fulliton*, 140 S.W.3d 304, 309-10 (Tenn. Ct. App. 2003). Here, however, the trial court found Wife guilty of two acts of criminal contempt and fined her fifty dollars for each violation. The civil judgment was a direct consequence of the trial court’s finding that Wife was in criminal contempt for failing to file her taxes in accordance with the trial court’s orders. By adding a civil judgment to Wife’s punishment, the trial court exceeded its authority to punish criminal contempt under Tenn. Code Ann. § 29-9-103. The judgment is also ineffective because, as discussed above, it stemmed directly from the defective criminal contempt hearing.

Conclusion

For the foregoing reasons, we reverse the trial court’s judgment finding Ms. Yates in criminal contempt. We remand the case for a division of the marital property in accordance with the statutory factors and the instructions of this opinion. The order of the trial court is otherwise affirmed. Costs of this appeal are assessed one-half to Appellant Ms. Yates and one-half to Appellee Mr. Yates.

J. STEVEN STAFFORD, J.